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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS I. FITZGERALD, PUBLIC ADMINISTRATOR,
Petitioner,

v.

AMERICAN TRADING AND PRODUCTION CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

Petitioner requests that a writ of certiorari issue to review the judgment of the Court of Appeals of New York entered in this case on November 27, 1979, affirming the Appellate Division's reversal of a jury verdict for petitioner.

OPINIONS BELOW

The memorandum decision by the Appellate Division of the New York Supreme Court, which is reported at 62 A.D. 2d 951, 404 N.Y.S. 2d 100, appears at Appendix A to this petition. The order of the Court of Appeals of New York affirming the decision of the Appellate Division, with one judge dissenting, which is not yet officially reported, appears at Appendix B to this petition. The Appellate Division's decision and its accompanying order, which appears at Appendix C to this petition,

reversed a judgment of the Trial Term of the New York Supreme Court, which appears at Appendix D to this petition. The Trial Term's judgment was entered on the basis of a jury verdict on special interrogatories, which appear at Appendix E to this petition.

JURISDICTION

The judgment of the Court of Appeals of New York was entered on November 27, 1979. Pet. App. 1b. Because this petition concerns a "right, privilege or immunity . . . claimed under . . . statutes of the United States," this Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

QUESTION PRESENTED

On December 16, 1966, Carl P. Blume, Master of the S.S. Washington Trader, was swept overboard in heavy seas while inspecting his vessel for damage; his body was never recovered. Petitioner, the administrator of Master Blume's estate, brought suit against respondent, the Washington Trader's owner, in New York State court to recover under the Jones Act, 46 U.S.C. § 688, and general federal maritime law for Master Blume's death. At trial, evidence was admitted showing that shortly before the accident there had been a loss of rudder control resulting in damage to the ship; that the ship's guardrail had been broken in the area of the deck where Master Blume had last been seen while inspecting the damage; and that the crew failed to initiate rescue efforts until hours after they should have realized that the Master had been swept overboard. Based on this evidence, the jury agreed in special interrogatories with petitioner's claim that the Master's death was the result of unseaworthiness and negligence for which respondent was responsible and returned a verdict for Master Blume's estate. The Appellate Division reversed, however, asserting that there

was insufficient evidence to support the verdict. The New York Court of Appeals affirmed, with one judge dissenting. Against this background, the question presented is:

> Whether, in an action based on the Jones Act and general federal maritime law, the New York appellate courts erroneously intruded on the fact-finding function of the jury, in direct contravention of previous decisions of this Court, by overturning the jury's verdict on theories of unseaworthiness and negligence where the record clearly contained evidence to support a verdict on either theory.

STATUTES INVOLVED

The Jones Act, 46 U.S.C. § 688, and the Federal Employers' Liability Acts, 45 U.S.C. §§ 51 *et seq.*, are reproduced in pertinent part at Appendix F to this petition.

STATEMENT OF THE CASE

Master Carl P. Blume was lost at sea on December 16, 1966, while inspecting his vessel, the S.S. Washington Trader, for damage caused or aggravated by heavy seas in the Pacific. To recover for his wrongful death, petitioner, the administrator of Master Blume's estate,[1] brought suit in New York State court against respondent, the Washington Trader's owner. Petitioner's complaint, which was based on both the Jones Act, 46 U.S.C. § 688, and general federal maritime law, charged that the Master's death had been caused by both respondent's negligence and the vessel's unseaworthiness.

At trial, evidence was introduced showing, among other things, (1) that the Washington Trader's rudder had failed early on the morning of December 16, causing the vessel to suffer broadside the full impact of heavy seas and to experience

[1] Master Blume died intestate, leaving a widow and minor child as his survivors.

considerable damage (Tr. 833-35, 839-41, 845);[2] (2) that Master Blume had been washed overboard later on the morning of December 16 while performing his duty of inspecting the damage to the vessel (Tr. 120-33); (3) that in the area on the poop deck where the Master had last been seen, the guardrail "was broken all along the side of the ship, all the way forward" (Tr. 126a-26b); and (4) that the crew failed to institute a search for the Master until hours after they knew or should have known of his disappearance (Tr. 122-35, 142).[3]

In light of such evidence, the trial court submitted the case to the jury on theories of negligence and unseaworthiness. Indeed, counsel for respondent acknowledged after presentation of all of the evidence that a matter such as unseaworthiness presents factual issues appropriate for resolution by the jury (Tr. 1481, 1516-17).[4]

The jury found in special interrogatories that respondent was negligent in a manner that contributed to Master Blume's death and that the vessel was unseaworthy in a manner that was the proximate cause of his death. Pet. App. 1e. The jury further found that the plaintiff's damages totalled $808,536, but that the Master's negligence had contributed to his death to the

[2] References to "Tr." are to the trial court transcript in this case. For the convenience of the Court, petitioner has caused to be certified and filed with this Court the record below, which includes the trial court transcript.

[3] There was also evidence to show that the Washington Trader's load was heavier than authorized for the winter zone of the Pacific, in which the vessel was sailing at the time the Master was lost. The trial court, however, took the issues of overloading and course-setting through the winter zone away from the jury for purposes of determining liability, since those matters were the responsibility of the Master (Tr. 1527-28)—a ruling in which the Appellate Division expressly concurred (Pet. App. 2a).

[4] For example, respondent's counsel stated at trial that "all questions of unseaworthiness are questions of fact for the jury." (Tr. 1517.)

extent of ten percent. *Id.* Accordingly, the trial court entered judgment for Master Blume's estate in the amount of $727,682.40 (ninety percent of $808,536), plus interest from the date of the Master's death.[5]

Respondent appealed the trial court's judgment to the Appellate Division of the New York Supreme Court. While appearing to recognize the applicability of federal law, the Appellate Division vacated the trial court's judgment and ordered the petitioner's complaint dismissed. Pet. App. 1c. The court expressed no disagreement with the trial court's legal rulings or with its jury instructions; rather it dismissed due to what it deemed an "insufficiency of proof" to sustain the jury's findings of negligence and unseaworthiness. Pet. App. 4a.

In particular, despite clear record evidence to the contrary, the Appellate Division purported to find "no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th" shortly before the Master was lost. Pet. App. 2a. Similarly, the appellate court claimed to find in the record "no evidence that the crew members should have known that the Master was washed overboard . . ." (Pet. App. 4a), although there was in fact testimony that certainly so indicated. And the court dismissed as "sheer speculation" any "finding that a defective storm rail on the poop deck contributed to the Master's loss. . ." because there was "no proof . . . that Master Blume went overboard in an area where the railing was defective"; the court ventured from certain testimony in the record the alternative theory that "the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea." Pet. App. 3a. In short, the Appellate Division overturned the jury's verdict on the basis of its own reading of the record.[6]

[5] On formal motion, the trial court denied respondent's request to set aside the jury's verdict.

[6] Without explanation, the Appellate Division added in dictum that the verdict was "against the weight of the credible evidence" and that the award of damages "was excessive." Pet. App. 4a.

Petitioner appealed to the New York Court of Appeals, arguing that the Appellate Division's decision impermissibly intruded on the province of the jury in seamen's cases as established by repeated decisions of this Court.[7] The Court of Appeals entered an order affirming "for reasons stated in the memorandum at [sic] the Appellate Division." Pet. App. 1b. One judge dissented with an opinion.

The dissenting judge, stressing "that Federal and not New York law controls this case," observed that the Appellate Division's decision "proceeds on a misconception of the letter and spirit of maritime law." Pet. App. 3b, 2b. The judge recognized that "in cases like the present one," some proof of negligence or unseaworthiness, " 'however small,' " is sufficient to raise questions for the jury (Pet. App. 3b); and he demonstrated that "to find support for a prima facie case in the record [below is] a remarkably easy task" (Pet. App. 4b). As a result, he urged reversal of the Appellate Division's judgment and reinstatement of the jury's verdict, noting "the clear intention of the Federal law that jury determinations of questions of fact [in cases such as this] govern irrespective of contrary judicial views as to the weight of the evidence" (Pet. App. 5b).

REASONS FOR GRANTING THE WRIT

In seamen's cases based on the Jones Act and general federal maritime law, it has long been established that only some evidence of unseaworthiness or negligence is required for the case to go to the jury and for a jury's verdict for the seaman to be sustained. Here, there clearly was evidence of both unseaworthiness and negligence in several respects, including evidence from which the jury could have concluded that Master Blume's vessel had lost its rudder control in heavy seas resulting in considerable damage to the vessel; that the railing on the

[7] See Plaintiff-Appellant's Brief in the Court of Appeals of New York, which has been certified and filed with this Court. See p. 4 n.2, above.

poop deck where the Master had last been seen inspecting the damage was missing or broken; that the crew had failed to initiate prompt efforts to rescue the Master when they had good reason to do so; and that one or more of these factors played a part in the Master's death.

In these circumstances, the appellate courts below, as a matter of settled federal law, wholly exceeded their proper function in overturning the jury's verdict for petitioner. This Court has repeatedly made clear that appellate courts may not upset jury verdicts in Jones Act and similar cases where, as here, there is some evidence, "however small," to support the seaman's claim.[8] Thus, the leading commentators on admiralty law have observed that:

> "[I]t would be a rare court in an unusual case which would take the negligence issue away from the jury and an even rarer appellate court which would reverse a jury verdict for plaintiff as opposed to the weight of the evidence."

C. Gilmore & C. Black, *The Law of Admiralty* 377 (2d ed. 1975).

The decision below is in direct conflict with this Court's prior rulings delineating the permissible scope of appellate review of jury verdicts in seamen's cases. Moreover, the decision, if allowed to stand, may have a significant adverse impact on large numbers of seamen's right to a jury-adjudication of their claims of unseaworthiness and negligence. Certiorari is, therefore, warranted in this case. In fact, this Court has previously stressed that "[s]pecial and important reasons for the grant of certiorari in . . . [cases such as this] are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Rogers* v. *Missouri P. R.R.*, 352 U.S. 500, 510 (1957).

[8] Cf. *Rogers* v. *Missouri P. R.R.*, 352 U.S. 500, 508 (1957).

I.

The Court Below Has Decided a Federal Question in Direct Conflict with Applicable Decisions of This Court.

A. Governing Federal Principles

Petitioner's complaint and the jury's finding in this case rest on two theories of liability: negligence and unseaworthiness. Pet. App. 1e. Because the right of a seaman, such as petitioner's decedent, to recover "for unseaworthiness and negligence is rooted in federal maritime law,"[9] the standard for liability on such claims is determined exclusively by federal law.

Accordingly, this Court has established that "the owner of a ship in navigable waters owes to all who are on board . . . the duty of exercising reasonable care under the circumstances of each case." *Kermarec* v. *Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). Likewise, the Court's decisions "undeviatingly" hold that a shipowner has a "duty to furnish a seaworthy ship [that] is absolute and completely independent of his duty under the Jones Act to exercise reasonable care." *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, 549 (1960) (citations omitted).[10] So defined, the substantive standards of negligence and unseaworthiness reflect the especially " 'humane and liberal character' " of federal law in the maritime area. See generally *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573, 583 (1974), quoting from *The Sea Gull*, 21 Fed. Cas. 909 (No. 12,578) (C.C. Md. 1865).

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[9] *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953); accord, *e.g.*, *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 429 (1958).

[10] Accord, *e.g.*, *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 94-95 (1946); *Mahnich* v. *Southern S.S. Co.*, 321 U.S. 96, 100 (1944). The doctrine of seaworthiness imposes on the shipowner a duty "to furnish a vessel and appurtenances reasonably fit for their intended use." *Mitchell* v. *Trawler Racer, Inc.*, *supra*, 362 U.S. at 550. A vessel or an appurtenance is unseaworthy if it proves to be "inadequate for the purpose for which it was ordinarily used . . . . " *Mahnich* v. *Southern S.S. Co.*, *supra*, 321 U.S. at 103.

Moreover, whether a seaman's action for negligence and unseaworthiness is tried in federal court or in state court, the procedural aspects of his case are also governed by federal law. The Jones Act expressly provides for a right of trial by jury in all such cases. See 46 U.S.C. § 688.[11] And the Constitution itself has placed "under national power" control over not only the " 'substantive' " but also " 'the procedural features' " of these cases. *Pope & Talbot, Inc.* v. *Hawn*, 346 U.S. 406, 409 (1953), quoting from *Panama R.R.* v. *Johnson*, 264 U.S. 375, 386 (1924).[12]

Consistently with this view, the Court has made plain that federal law determines in all courts—state and federal—the evidentiary threshold for submitting a seaman's case to the jury. See, *e.g.*, *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Rogers* v. *Missouri P. R.R.*, *supra*, 352 U.S. at 509-10.[13] See also *Garrett* v. *Moore-McCormack Co.*, 317 U.S. 239, 244 (1942). What is more, the threshold established by this Court—like the substantive standards for liability—clearly

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[11] See, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523, 524 (1956). Where, as here, a seaman joins a claim of negligence under the Jones Act with a claim of unseaworthiness under general federal maritime law, both claims are for the jury to decide—so long as the requisite evidentiary threshold is met on each claim—and a resulting jury verdict for the plaintiff must be sustained if supportable on either claim. See, *e.g.*, *Fitzgerald* v. *United States*, 374 U.S. 16 (1963); *Pope & Talbot* v. *Hawn*, *supra*, 346 U.S. at 406.

[12] See also *Kermarec* v. *Compagnie Generale Transatlantique*, *supra*, 358 U.S. at 628-29.

[13] *Rogers* involved a suit under the Federal Employers Liability Acts, 45 U.S.C. §§ 51 *et seq.*, that are incorporated into the Jones Act pursuant to its express command that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . . " 46 U.S.C. § 688. It is well established that the principles and procedures developed under the FELA are equally applicable in suits under the Jones Act, see, *e.g.*, *Kernan* v. *American Dredging Co.*, *supra*, 355 U.S. at 439, and this clearly includes FELA evidentiary standards, see *Ferguson* v. *Moore-McCormack Lines, Inc.*, *supra*, 352 U.S. at 523.

reflects the "humane and liberal character" of federal maritime law: only " '*some evidence* of negligence' " is necessary to send a seaman's case to a jury, *Schulz* v. *Pennsylvania R.R.*, 350 U.S. 523 (1956) (emphasis added); and "[o]nly when there is *a complete absence of probative facts* to support the [jury's] conclusion" may its verdict be set aside, *Lavender* v. *Kurn*, 327 U.S. 645, 653 (1946) (emphasis added). See generally C. Gilmore & C. Black, *supra*, at 376-78.

Thus, neither the circumstantial nature of a seaman's proof[14] nor the quantity of his evidence[15] affects the threshold for submitting a seaman's case to the jury or for insulating the jury's verdict from appellate reversal. Moreover, so long as there is some evidence to support the jury's verdict, it is simply "immaterial" that the courts might draw "a contrary inference or feel that another conclusion is more reasonable." *Lavender* v. *Kurn*, *supra*, 327 U.S. at 653. Under the Jones Act, as under the FELA, "the jury, not the court, . . . is the fact-finding body" with regard to questions of negligence, *Tennant* v. *Peoria & P.U. Ry.*, 321 U.S. 29, 35 (1944); and the same is true with regard to questions of unseaworthiness when tried in suits brought under the Jones Act (see p. 9 n. 11, above).

Finally, unlike cases involving land-based torts, once some evidence of a shipowner's fault has been introduced, no further proof of proximate causation is required. For a seaman's case to go to the jury, it is necessary only that his proof justify "the conclusion that employer negligence *played any part, even the slightest,* in producing the injury or death for which damages

[14] "The burden of the employee is met, and the obligation of the employer to pay damages arises, when there is proof, even though entirely circumstantial, from which the jury may with reason make [the] inference [that the employer's negligence played some part in the death or injury which gave rise to the suit]." *Rogers* v. *Missouri P. R.R.*, *supra*, 352 U.S. at 508; accord, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, *supra*, 350 U.S. at 526.

[15] See, *e.g.*, *Lavender* v. *Kurn*, *supra*, 327 U.S. at 652-53.

are sought." *Rogers* v. *Missouri P. R.R.*, 352 U.S. at 506 (emphasis added).[16] Indeed, to avoid a jury verdict once such proof has been admitted, the employer must—as the leading commentators on admiralty law have recognized—"establish by indisputable and uncontroverted evidence both the cause of the accident and [his] own freedom from negligence." C. Gilmore & C. Black, *supra*, at 378.

The decision below was rendered in complete disregard of these settled federal principles that have long governed the adjudication of seamen's cases such as the present one.

B. The Evidence in this Case

At trial, petitioner submitted probative evidence that Master Blume's death resulted, at least in part, from both unseaworthiness and negligence for which respondent, as owner of the Washington Trader, was responsible. Consequently, as the dissenting Judge below noted, it is "remarkably easy" to find "support for a prima facie case in the record" here. Pet. App. 4b. The appellate courts below chose, however, to ignore much of petitioner's evidence and to draw from the record their own inferences contrary to those of the jury. By so doing, those courts invaded the province of the jury, deprived petitioner of his established federal right to trial by jury, and acted in direct disregard of this Court's repeated holdings concerning the deference to be accorded jury verdicts in seamen's cases.

To demonstrate the appellate courts' serious and unwarranted interference with petitioner's jury trial right, it is sufficient to consider here just three examples of record evidence, each of which *independently provides* an adequate basis for the jury's verdict in this case under established federal standards:

[16] Accord, *e.g.*, *Schulz* v. *Pennsylvania R.R.*, *supra*, 350 U.S. at 526; *Gallick* v. *The Baltimore & O. R.R.*, 372 U.S. 108, 113-17 (1963).

First, the Appellate Division's decision, which constituted the sole basis for the Court of Appeal's order (Pet. App. 1b), was expressly premised on the assertion that "[t]here simply is no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16" (Pet. App. 2a), the morning on which Master Blume was lost. However, the Washington Trader's Chief Mate, Mr. Perkins, respondent's own witness, expressly acknowledged at trial that the vessel had "lost rudder" on "the morning of the 16th." (Tr. 833-34.)[17]

There is no question that such a loss of rudder control constitutes an unseaworthy condition for which respondent is absolutely responsible (see p. 8, above).[18] Further, there is record evidence indicating that the loss of rudder control early on December 16 caused the Washington Trader to "broach[] to" and to suffer considerable damage in heavy seas (Tr. 840-41, 845, 701-07), and that Master Blume was lost while performing his duty to inspect such damage (Tr. 120-33).

[17] The Chief Mate also testified that he was awakened "about three o'clock in the morning on the 16th of December," called to the vessel's bridge, and there met Master Blume who told him "that the ship had lost its rudder and lost her steerage and . . . had sustained some damage on deck . . . . " (Tr. 839-40; see also Tr. 1376-77.)

There was also evidence that the Washington Trader lost rudder control on December 13 (Pltfs' Exh. 7); but, as the preceding testimony shows, the record certainly is *not* "clear"—as the Appellate Division claims (Pet. App. 2a)—"that there was a loss of rudder control on *only*" December 13 (emphasis added). Indeed, the Appellate Division's assertion is based entirely on its unquestioning acceptance of the ship's log of December 12-13, yet there was evidence before the jury casting considerable doubt on the reliability of the log, including evidence as to lapses or delays in maintaining logs of this kind (Tr. 1387-90) and evidence of alteration and omissions from the Washington Trader's log (Tr. 1363-72, 1383-94).

[18] In fact, the trial court specifically instructed the jury that the loss of rudder control constitutes an unseaworthy condition (Tr. 1566), and neither of the New York appellate courts expressed any disagreement with this instruction.

Thus, despite what the Appellate Division asserts, there were "probative facts" in the record from which the jury could have found that Master Blume's death was, at least in part, the result of the unseaworthy condition of the S.S. Washington Trader's steering mechanism.[19] Cf. *Lavender* v. *Kurn, supra,* 327 U.S. at 653; *Gallick* v. *The Baltimore & O. R.R.,* 372 U.S. 108, 113-17 (1963).

Second, Seaman Kuberski, a member of the Washington Trader's crew on the fatal voyage, testified at trial that the poop deck railing "was broken all along the side of the ship, all the way forward," in the location where Master Blume had last been seen inspecting the vessel for damage. (Tr. 126a-126b.)[20] The courts below did not question, as they could not (see p. 8, above), that such a broken guardrail constituted an unseaworthy condition for which respondent was responsible. However, because the evidence did not establish precisely where Master Blume went overboard, the Appellate Division decided that "any finding that a defective storm railing on the poop deck contributed to the Master's loss is sheer speculation." Pet. App. 3a.

But this Court has made clear that in cases of this type "[i]t is no answer to say that the jury's verdict involved speculation . . . . " *Lavender* v. *Kurn, supra,* 327 U.S. at 653. Seaman Kuberski testified that he saw Master Blume enter an outer passageway on the port side of the ship in the area where the railing "was broken all along the side of the ship"; that he then saw heavy seas wash down that passageway; and that he never saw the Master again. (Tr. 121-126b.) From such evidence, the jury, as trier of fact, was certainly entitled to infer

[19] The trial court, without objection by respondent's counsel, properly instructed the jury on the need for "a direct causal relationship between the defect complained of and the ultimate loss." (Tr. 1567).

[20] There was additional testimony based on a damage report corroborating Kuberski's testimony concerning damage to the railing on the poop deck. (Tr. 425-26.)

that the Master had been washed overboard at a place where the railing was broken, although neither Kuberski nor anyone else may actually have seen this occur.[21] In short, there clearly was " 'some evidence' " on which the jury could have found that the broken railing played a part in Master Blume's death. Cf. *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 523; *Rogers v. Missouri P. R.R., supra,* 352 U.S. at 506-07.[22]

Third, in response to petitioner's argument at trial that respondent's crew negligently delayed attempts to rescue Master Blume until several hours after he had disappeared in heavy seas, the Appellate Division baldly asserted that "[t]here is no evidence that the crew members should have known that the Master was washed overboard." Pet. App. 4a. But Seaman

[21] This is especially true since Kuberski also acknowledged that "[o]ther than this railing ... described as being bent and broken" there was not "anything ... to prevent anything or anybody from going over the side" in the area where the Master disappeared (Tr. 127) and that there was "[o]nly one place he [the Master] could have went," namely, "[o]ver the side" (Tr. 133).

[22] There was also evidence from which the jury could have found that respondent, through its employee Chief Mate Perkins, was negligent in failing to replace or repair the broken railing on the poop deck prior to the Master's loss. Perkins, who was in charge of the deck department (Tr. 761-62), testified that he was summoned to the bridge early on the morning of December 16, and that Master Blume told him that "the ship had lost its rudder ...," that "they had sustained some damage on deck," and that he was "to check it" (Tr. 840). Perkins proceeded to the aft part of the vessel where he shined a flashlight on the deck damage, but could not see it completely in the dark; he returned to the bridge to report to the Master and then went back to sleep. (Tr. 840, 727.) As to railings that he found upon his inspection to be damaged or missing, he claimed that it was "impossible" to get to them in order to string rope life-lines, although he and his men had done so on other occasions. (Tr. 882-83). From such evidence, the jury was entitled to infer negligence on the part of the crew and that such negligence ultimately played a part in the Master's death (see pp. 10-11, above). Cf., *e.g., Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 33-36.

Kuberski's testimony plainly allows—if not compels—that inference. After testifying that heavy seas struck the area on the poop deck where the Master was last seen inspecting for damage (Tr. 122-24), Kuberski went on to state:

> "We looked out to see if anything happened and we didn't see him, *so I took it for granted that he got out of the way* .... And I didn't realize until later on, then we started thinking about it. And then finally it dawned on us that might have happened to him. Because I know the water hit him and it hit real hard." (Tr. 134 (emphasis added)).

Moreover, it was not until over an hour, if not more, after the events on the poop deck that Kuberski reported to Chief Mate Perkins what he had seen—and not seen—occur (Tr. 127-35);[23] and the Chief Mate did not initiate efforts to rescue Master Blume until at least another three hours after receiving Kuberski's report (Tr. 142). "Fair-minded men could certainly find from the foregoing facts" that respondent, through its employees, was guilty of negligence that contributed to the loss of Master Blume;[24] indeed, the jury apparently did so (Pet. App. 1e). In all events, given the record evidence concerning the crew's conduct on the morning when the Master dis-

[23] Kuberski testified that, after the heavy seas had struck the area where Master Blume was last known to have been, he and the other crewman with him "looked for several minutes and then—then we didn't. Then we sat down and I finish [*sic*] my coffee." (Tr. 126.) Kuberski never saw the Master again after this time. (Tr. 126-126a.)

[24] *Schulz* v. *Pennsylvania R.R., supra,* 350 U.S. at 526. This is not to say Kuberski willfully ignored the Master's plight. However, it is generally understood that "negligence consists of doing that which a person of reasonable prudence would not have done or of failing to do that which a person of reasonable prudence would have done under like circumstances." *Id.* at 525. These are questions " 'for the jury to determine,' " *id.* (citation omitted), and in this case the jury certainly could have found from the evidence that Kuberski—and others—"fail[ed] to do that which a person of reasonable prudence would have done under like circumstances."

appeared, there obviously was not the "complete absence of probative facts" that must exist before the jury's verdict may be overturned. *Lavender* v. *Kurn, supra,* 327 U.S. at 653.

There is, to be sure, other evidence in the record concerning the loss of steerage, the condition of the guardrails, and even the adequacy of the crew's response to Master Blume's disappearance. But that is not the issue here. It was the jury's function to decide what evidence to believe and not to believe, see *Lavender* v. *Kurn, supra,* 327 U.S. at 653; and it was the jury's function "to select from among conflicting inferences and conclusions that which it consider[ed] most reasonable," *Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 35.

The jury having performed these functions on the basis of ample record evidence, neither the respondent nor the reviewing courts were "free to relitigate the factual dispute[s]" involved in this case. *Lavender* v. *Kurn, supra,* 327 U.S. at 652. Despite this fact, the courts below clearly chose to impose on this case their own view of the record and thus reversed the jury's unanimous verdict for petitioner on both unseaworthiness and negligence.[25] By so doing, those courts invaded "the

[25] In reversing the jury's verdict, the Appellate Division observed that, at the time Master Blume was lost, the Washington Trader "was 'pooping the seas,' . . . a nautical term for bow-to-stern movement with the vessel scooping up and taking seas over the stern." Pet. App. 3a. The court claimed that expert testimony had shown this to be a "dangerous" situation for which the Master was responsible and implied that respondent is therefore relieved of all liability for the Master's loss. Pet. App. 3a, 4a. While these remarks illustrate just how far the Appellate Division went in retrying the case to suit its own views rather than deferring to those of the jury, the essential point is that the Master's conduct was relevant only to assessing contributory negligence, an issue on which the jury was fully and correctly charged (Tr. 1587-89) and on which the jury in fact returned a verdict of ten percent fault on the part of Master Blume (Pet. App. 1e). This Court's decisions make clear that the Master's own fault, if any,

(*footnote continues*)

historic function" of the jury in direct conflict with numerous decisions of this Court,[26] and certiorari is, therefore, necessary to vindicate the right to jury trial in cases such as this. Cf. *Rogers* v. *Missouri P. R.R., supra,* 352 U.S. at 510.

II.

The Decision Below Should Be Summarily Reversed.

This Court has repeatedly emphasized that appellate courts may not overturn jury verdicts in seamen's and similar cases so long as there is " 'some evidence' " of negligence or unseaworthiness. See pp. 10, above; C. Gilmore & C. Black, *supra,* at 376-78. Nonetheless, the Appellate Division did so in this case, and the Court of Appeals sustained its decision.

Where lower courts have thus failed to respect the evidentiary threshold established by this Court for Jones Act and similar cases, this Court has regularly granted certiorari, summarily reversed the appellate court decision, and directed that the jury's verdict be reinstated. *E.g., Stinson* v. *Atlantic Coast Line Railroad Co.,* 355 U.S. 62 (1957); *Butler* v. *Whiteman,* 356 U.S. 271 (1958). See also *Palermo* v. *Luckenbach S.S. Co.,* 355 U.S. 20 (1957). See generally *Harris* v. *Pennsylvania R.R.,* 361 U.S. 15, 19-21 (1958) (appendix to

(*footnote continued*)

provides no basis for taking the case from the jury and denying recovery altogether. See, *e.g., Kermarec* v. *Compagnie Generale Transatlantique, supra,* 358 U.S. at 629; *Pope & Talbot, Inc.* v. *Hawn, supra,* 346 U.S. at 408-09. This same point disposes of the Appellate Division's suggestion that recovery should be denied because overloading of the Washington Trader, for which the Master was responsible, may also have contributed to his loss. Pet. App. 3a.

[26] See, *e.g., Lavender* v. *Kurn, supra,* 327 U.S. at 652-53; *Schulz* v. *Pennsylvania R.R., supra.* As this Court observed in *Tennant* v. *Peoria & P. U. Ry., supra,* 321 U.S. at 35: "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

concurring opinion of Douglas, J., citing and categorizing cases). In light of the record here, petitioner submits that this is the most appropriate disposition of the present case.[27] Indeed, such a disposition is especially appropriate because the New York State courts are one of our Nation's principal maritime jurisdictions; and thus the decision below, if allowed to stand, could seriously impact large numbers of cases in which seamen seek to exercise their federally guaranteed right to a jury-adjudication of their negligence and unseaworthiness claims.

CONCLUSION

For the reasons stated, certiorari should be granted, the decision below summarily reversed, and the case remanded with instructions to reinstate the jury's verdict. Alternatively, certiorari should be granted and the case set for plenary review.

Respectfully submitted,

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February 1980

[27] Due to the clear conflict between the appellate decisions below and this Court's holdings, this Court should, at the least, grant certiorari and set the case for plenary review.

APPENDIX A

APPENDIX A

MEMORANDUM DECISION

APPELLATE DIVISION, SUPREME COURT
FIRST DEPARTMENT

April 20, 1978

Murphy, P.J., Birns, Silverman, Evans, Sullivan, JJ.

1962 Thomas I. Fitzgerald, etc., as Administrator of the Estate of Carl P. Blume, deceased,

Plaintiff-Respondent K. Heller

—against—

American Trading and Production Corp.,

Defendant-Appellant J.M. Costello

Judgment, Supreme Court, New York County (Greenfield, J.), entered May 17, 1977 in the sum of $1,227,520.12, unanimously reversed, on the law, vacated and the complaint dismissed, without costs and without disbursements.

The verdict in plaintiff's favor for the wrongful death of Carl P. Blume, Master of the S.S. Washington Trader, a converted tanker owned by defendant, was based on both unseaworthiness and negligence.

On December 16, 1966, Master Blume perished in the North Pacific. He was last seen in circumstances suggesting, as plaintiff contends, that he was swept overboard by heavy seas as he was making a tour of inspection at first light. It is conceded that the vessel had been loaded to the maximum permitted for a voyage in the Summer Zone but that it overloaded for the Winter Zone. A vessel in the Winter Zone will encounter heavier seas. Hence, the vessel requires more reserve buoyancy for safety. This reserve buoyancy factor is determined by the depth of the hull in the water. The lower the hull is submerged the less free board or buoyancy. The depth

of the hull can be gauged by looking at the vessel's Plimsoll marks. The evidence discloses that the shipowner designated the port of departure and destination as well as a port for taking on additional bunkers. The loading of the vessel, the amount of fuel to be taken aboard, the amount of stores as well as the setting of a course for the vessel are the exclusive responsibility of the Master. Master Blume set a course which he selected from three available routes. In point of fact, there was an insufficient supply of fuel for one of the routes, and the other posed greater hazards in the winter months than the one chosen. When the vessel, loaded with grain, left Portland, Oregon, bound for India, the Certificate of Loading issued by the Coast Guard showed compliance with the international load line regulations for the Summer Zone. The course set by Master Blume, however, took the vessel into the Winter Zone. This was a violation of law. (46 U.S.C. §85 et seq.) From the time of her departure on December 3rd until the morning of December 16th, the Trader encountered heavy seas and bad weather. As early as December 5-7, the Trader was "rolling hearily (sic) in deep . . . swells!" On December 8-9, her log showed "mountainous seas on deck, heavy swell." Overloading a vessel is, of course, a statutory fault and an overloaded vessel is unseaworthy. (See *The Indien,* 71 F. 2d 752 [9th Circuit]; *The Benjamin Noble,* 244 F. 95 [6th Circuit]). However, the trial court quite properly took the issue of overloading as well as the setting of the course through the Winter Zone away from the jury because both were solely the responsibility of the Master (Cf. *Walker* v. *Lykes Bros. Steamship Co., Inc.,* 193 F. 2d 772.) By taking his overloaded vessel into the Winter Zone Master Blume consciously violated a duty of his employment as Master. (Cf. *The Giles Loring,* 48 F. 463.) Once these issues were removed from the jury's consideration we fail to find evidence of either unseaworthiness or negligence in this record sufficient to sustain the verdict. There simply is no evidence of a breakdown in the ship's steering mechanism in the early morning of December 16th, as plaintiff contends. The record is clear that there was a loss of rudder control on only occasion, at

0215 hours on the morning of December 13th, a few days earlier. That loss of steering was attributed to an open oil by-pass valve in the steering engine and it is undisputed that control was restored 13 minutes later. Absence of proof of the rudder failure on December 16th eliminates two basic contentions of plaintiff, namely, that the inability to steer and maintain headway constituted an unseaworthy condition which resulted in damage to the vessel from the heavy seas, and that the Master was swept overboard while performing his duty to inspect to determine the extent of that damage. Even if it were shown that the vessel sustained damage on the thirteenth from the heavy seas no causal connection was shown between that incident and the loss of the Master a few days later. As for the specification of unseaworthiness based on a broken or bent storm railing on the poop deck, there simply is no proof that any defective railing was a proximate cause of the Master's loss. There is no proof even that Master Blume went overboard in an area where the railing was defective. In fact, plaintiff's expert testified that the Master could have been knocked unconscious against a railing or bulkhead or washed directly into the sea. Therefore, any finding that a defective storm railing on the poop deck contributed to the Master's loss is sheer speculation.

It is evident from testimony in the record that an overloaded vessel encountering heavy seas in the Winter Zone would tend to ship waves across its decks. The combined weight of the cargo itself and the waves washing over the decks would submerge the vessel deeper into the water. Thus, the presence of any sea water in the forward parts of the Trader after the Master was lost was caused by the overloading of the vessel. There is no evidence that the water entered that area for any other reason.

The record further discloses that at the time the Master went overboard the Trader was "pooping the seas", which is a nautical term for bow-to-stern movement with the vessel scooping up and taking seas over the stern. Plaintiff's expert testified

that taking seas over the stern is dangerous in heavy seas. This is, of course, a navigational act attributable to the Master.

As for the claims of negligence we find neither fault nor proximate cause even if fault exists. There is no evidence that the crew members should have known that the Master was washed overboard or that they failed to institute proper procedures to determine if he was lost. Nor is there a basis in the record from which to conclude that the chief mate should have accompanied the Master on his fateful inspection tour. Finally, we note that were we not dismissing for insufficiency of proof, we would, in any event, set aside the verdict as against the weight of the credible evidence and because the award of damages was excessive.

Order filed.

APPENDIX B

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

No. 448

Thomas I. Fitzgerald, &c.,
as Administrator of the
Estate of Carl P. Blume,
Deceased,

Appellant,

vs.

American Trading and Production Corp.,
Respondent.

Dissenting Opinion

This opinion is uncorrected and subject to revision before publication in the New York Reports.

(448) Robert Markewich & Kenneth Heller, NY City, for appellant.

Joseph M. Costello & Frederick N. Gaffney, NY City, for respondent.

* * *

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (62 A D 2d 951). All concur except Fuchsberg, J., who dissents and votes to reverse in an opinion.

Decided November 27, 1979

Fitzgerald v. American Trading and Production Company

Case No: 448

FUCHSBERG, J. (dissenting):

As best I can fathom it from the record, the opinion and order of the Appellate Division dismissing the complaint proceeds on a misconception of the letter and spirit of maritime law.

To initiates in the law of the sea this is not a complex case. The plaintiff's decedent, Carl P. Blume, Master of a tanker owned by defendant was swept overboard in rough weather during a voyage across the Pacific from the United States to India. This action for wrongful death brought on theories of unseaworthiness and negligence, was anchored in the main on allegations that (1) on the day Blume lost his life the ship was wallowing helplessly in extremely turbulent seas, having lost rudder control because of a defective valve; (2) that the Master had set out on a tour of inspection of the extensive consequent damage to the vessel; (3) that, while so engaged, he disappeared from sight in heavy seas at a point where unrepaired protective railings had been washed away or damaged; and (4) that the ship did not reverse course to search for the Master until five hours and forty minutes later.[1]

After an extensive jury trial, Justice Greenfield, in an impeccable charge, submitted issues of alleged unseaworthiness and negligence, along with those of proximate cause, contributory negligence and damages, to the jury. The jury returned a verdict of $808,536, reduced by its finding that contributory negligence accounted for ten per cent of the loss, to $727,682.40. Although the trial judge denied all motions to disturb the verdict, the Appellate Division reversed the judgment entered thereon and, as indicated, dismissed the complaint. I believe the law and the facts leave us no option but to reinstate the judgment.

---

[1] Issues as to overloading and course-setting had also been pressed but were withdrawn from the jury's consideration by the court before the case went to the jury on the ground that these would have been the exclusive responsibility of the Master of the vessel himself.

At the outset, I stress that Federal and not New York law controls this case. Though the Federal Judiciary Act grants concurrent jurisdiction to the Federal and State courts (US Code, tit. 28, § 1333), all must apply the Federal law in order to secure a single uniform body of admiralty law (see *Matter of Rederi* [*Dow Chemical Co*], 25 NY2d 576, 581 [Fuld, Ch.J.]).

Supplanting the ordinary common law duty of master and servant, maritime law is imbued with an overtly "humanitarian policy" responsive to the hazards faced by those who go to sea and, accordingly, has seen fit to implement that policy by shifting the burden of the cost of injury to those thought best able to bear it. Thus, the law has imposed a liability for risks which the owner of a vessel can prevent, whether by providing a seaworthy vessel or avoiding negligence, that for all practical purposes is absolute. (*Seas Shipping Co.* v. *Sieracki*, 328 US 85, 93-94; *Milin* v. *United States Lines, Inc.*, 31 NY2d 336, 338.) And as to negligence, Federal statutory law, has for like reasons made inapplicable the traditional tort doctrines of assumption of risk and contributory negligence (US Code, tit. 45 [Federal Employers' Liability Act] as incorporated by US Code, tit. 46, § 688 [Jones Act]; see *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 US 521).

Furthermore, consistent with the protective nature of this substantive law, the level of proof necessary to establish a prima facie case of either unseaworthiness or negligence is reduced to a point where it can fairly be said that no more than a scintilla of evidence is necessary. So, in contrast to the heavier burden usually assessed by the common law, in cases like the present one it has been authoritatively stated that it suffices if there is proof that negligence or unseaworthiness played any part "however small" in causing an injury or death (*Rodgers* v. *Missouri Pac RR*, 352 US 500, 506-510). Among other characterizations recognized as accurate descriptions of the requisite showing are "featherweight" (*Landry* v. *Two R. Drilling Co.*, 511 F.2d 138, 142) and "slight" (Gilmore & Black, Admiralty, § 6-30, p 311).

So measured, to find support for a prima facie case in the record was a remarkably easy task.

Turning first to the loss of steering, the damage it caused and the fatal danger-ridden inspection thus precipitated, the defendant disputed whether the loss of rudder control occurred on December 16th, when the fatality occurred, or three days earlier, on December 13th, as the ship's log entry indicated. But the entry hardly had to be determinative since there was proof of various irregularities in the log; these included the fact that entries were not always made contemporaneously, thus opening up the real possibility that an entry date made later, especially under the stress of a very trying voyage, would be inaccurate. Moreover, because of the interposition of the international date line and the accompanying change of time zones, the difference between the two dates may have actually represented something less than two days. And, perhaps most important, even if the loss of steering and resulting damage indeed had occurred on the 13th, the result would only have enlarged the period during which evidence of unseaworthiness—including both the condition of the guardrails and the other damage—had existed to the 16th.

Next, with respect to the circumstances of Master Blume's demise, according to the testimony of the witness Kuberaski, who last saw the Master before he disappeared from sight as "green water" hit the ship, there was nowhere Master Blume could then have gone except overboard at that point. Notably, the damaged and missing rails, whose repair was the charge of Chief Officer Perkins, were the only things that could have prevented his being swept away. In fact, at one point defendant's counsel agreed that whether the guardrails were unseaworthy and, if so, proximately causative of the death, was a question of fact for the jury.

With regard to the actual drowning and the failure to fulfill the obligation to search, I need only note that the record raised issues of fact as to whether the conduct of the ship's personnel

comported with their duty under the circumstances (see *Abbott* v. *US Lines Co.*, 512 F2d 118, 121).

From all this evidence, the jury was certainly not compelled to draw the inferences which the Appellate Division ultimately did. Rather, as the trial judge correctly recognized, it was for the triers of the facts, not a reviewing court, to select from among the available inferences and conclusions those which it considered most reasonable (see *Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 US 29, 35). For the same reasons, though the trial judge came to the conclusion that loading and course-setting were primarily duties owed by the Master to the vessel's owner as his sole responsibility and therefore would not permit them to serve as an affirmative premise for recovery, it was for the jury alone to determine, as it did, what role these factors played on the issue of proximate cause or as a contributing factor in diminution of a recovery for negligence.

Finally, a word as to why I not only would reverse but would reinstate the judgment as well. Ordinarily, the Appellate Division's reversal having been on the law, a remittal to it for review of the facts would be in order (CPLR § 5501, subd c). However, I believe that our rule of practice must bow to the dictates of the Jones Act and Federal maritime law. For a "maritime tort is placed by the United States Constitution under the national power to control 'its substance *as well as its procedural features*' " (*Pope & Talbot, Inc.* v. *Hawn*, 346 US 408, 409 [Black, J.], quoting *Panama R. Co.* v. *Johnson*, 264 US 375) (emphasis mine). A contrary view would affect the result of the litigation, "i.e., would be outcome determinative" (*Matter of Rederi* [*Dow Chemical Co.*], *supra*, 581). It would subvert the clear intention of the Federal law that jury determinations of questions of fact govern irrespective of contrary judicial views as to the weight of the evidence. Accordingly, neither our State Constitution nor our procedural statutes are an impediment to the enforcement of the philosophy written into maritime law (US Const., art 6, clause 2).

APPENDIX C

APPENDIX C

ORDER OF APPELLATE DIVISION,
FIRST DEPARTMENT, APRIL 20, 1978

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 20, 1978

Present—Hon. FRANCIS T. MURPHY, JR., Presiding Justice
HAROLD BIRNS
SAMUEL J. SILVERMAN
HERBERT B. EVANS
JOSEPH P. SULLIVAN
Justices

1962

Thomas I. Fitzgerald, Public Administrator
of the County of New York, as Administrator of
the Estate of Carl P. Blume, deceased,
Plaintiff-Respondent,

-against-

American Trading and Production Corp.,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from a judgment of the Supreme Court, New York County (Greenfield, J.) entered on May 17, 1977 in favor of the plaintiff against the defendant in the total amount of $1,227,520.12 and said appeal having been argued by Mr. Joseph M. Costello of counsel for the appellant, and by Mr. Kenneth Heller of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby reversed, on the law, without costs and without disbursements, vacated and the complaint dismissed. The Clerk is directed to enter judgment in favor of the defendant-appellant dismissing the complaint.

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF NEW YORK.

THOMAS I. FITZGERALD, Public Administrator of the County of New York, as Administrator of the Estate of Carl. P. Blume, deceased,

Plaintiff,

against

AMERICAN TRADING AND PRODUCTION CORP.,

Defendant.

Index No. 19530/67

The above entitled action having duly come in for trial before Honorable Judge Edward J. Greenfield, and a jury at a Trial Term, Part 22 of the Supreme Court, held in and for the County of New York, at the Courthouse, 60 Centre Street, in the City of New York, on April 25, 26, 27, 28, 29 and May 2, 3, 4, 5, 6 and 9, and the plaintiff having appeared by Kenneth Heller, Esq., attorney for the plaintiff and the defendant having appeared by D'Amato, Costello and Shea, attorneys for defendant, and the issues having been duly tried; and the jury having rendered a special and general verdict in favor of the plaintiff against the defendant American Trading and Production Corp., on May 9, 1977, in the amount of $808,536.00, and the jury having found 10% contributory negligence on the part of the plaintiff, and the Court having fixed the sum of 90% of $808,536.00 at $727,682.40, with interest to run from December 16, 1966, and the Court having denied the motions by defendant to set the verdict aside, and the costs and disbursements of the plaintiff having been taxed in the sum of $582.10,

Now, on motion of Kenneth Heller, attorney for the plaintiff, it is

Adjudged, that the plaintiff, Thomas I. Fitzgerald, Public Administrator of the County of New York, as Administrator of the Estate of Carl P. Blume, Deceased, have judgment against the defendant, American Trading and Production Corp., on the issues as tried, and it is further

Adjudged, that the plaintiff, Thomas I. Fitzergald, Public Administrator of the County of New York, as Administrator of the Estate of Car! P. Blume, Deceased, of 31 Chambers St., N. Y. C., recover of the defendant American Trading and Production Corp., residing at 555 Fifth Avenue, New York, New York, the sum of $727,682.40, together with the sum of $499,255.62, representing interest thereon from the 16th day of December 1966, together with the sum of $582.10/100 costs and disbursements as taxed, making the total sum of $1,227,520.12/100, and that the plaintiff have execution therefor.

Judgment signed and entered this 17th day of May, 1977.

NORMAN GOODMAN

Clerk

Filed
May 17 1977
New York
Co. Clerk's Office

APPENDIX E

APPENDIX E

QUESTIONS

1. Was defendant, its agent or employees negligent in a manner that played any part, even the slightest, in causing Captain Blume's death?

Yes ✓ No ____

2. Was the vessel S.S. WASHINGTON TRADER unseaworthy in a manner that was a proximate cause of Captain Blume's death?

Yes ✓ No ____

If your answer to both questions 1 and 2 was "no", do not answer the remaining questions. If your answer to either Question 1 or 2 both was "yes", answer the remaining questions.

3. Was plaintiff negligent in a manner that contributed to causing his death?

Yes ✓ No ____

4. If your answer was "yes" to Question 3, then to what extent if any, did his negligence contribute to causing his own death? Express your answer in terms of a percentage

10%

5. Fill in the amounts that will adequately and fairly compensate plaintiff for his damages, without any reduction for negligence, if any on Captain Blume's part.

$808,536.00

Wages-past & future	$808,536.00
Consortium	0
Care & nurture	0
	$808,536.00

APPENDIX F

APPENDIX F

The Jones Act, Title 46 U.S.C. §688, provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Federal Employers' Liability Act (Title 45 U.S.C.) states in pertinent part:

> §51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependant upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or

by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§53. In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§54. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§56. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.